NO. 80-996

Supreme Court, U. S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

BARBARA McGINLEY,

Petitioner,

-against-

CHARLES J. HYNES, Deputy Attorney General,
of the State of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

Whether this Court should reexamine its sixty year old holding in *United States v. Thompson*, 251 U.S. 407 (1920), and reconsider whether due process of law is violated by multiple submissions of the same case to successive grand juries, without judicial scrutiny or approval, where a prior grand jury has failed to indict?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980
No.

BARBARA McGINLEY,

Petitioner,

against

CHARLES J. HYNES, Deputy Attorney General,
of the State of New York,

Respondent.

PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the New York Court of Appeals, officially cited as 51 NY2d 116 (1980) appears in the Appendix at page 2a. The opinion of the Appellate Division, Second Department, officially cited as 75 A.D.2d 897 (2nd Dept., 1980) appears in the appendix at page 15a.

JURISDICTION

The judgment of the New York Court of Appeals was entered on the 14th day of October, 1980. A timely motion for reargument or for a stay and an amendment of the remittur was denied on the 13th day of November, 1980 and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Fourteenth Amendment to the United States Constitution states as follows:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law . . . "

STATEMENT OF THE CASE

Section 63 (8) of the Executive Law of the State of New York authorizes the Governor of the State of New York to appoint a Special Prosecutor to carry out a designated investigation. It provides as follows:

> 8. Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice. For such purpose he may, in his discretion, and without civil service examination, appoint and employ, and at pleasure remove, such deputies, officers and other persons as he deems necessary, determine their duties and, with the approval of the governor, fix their compensation. All appointments made pursuant to this subdivision shall be immediately reported to the governor, and shall not be reported to any other state officer or department. Payments of salaries and compensation of officers and employees and of the expenses of the inquiry shall be made out of funds provided by the legislature for such purposes, which shall be deposited in a bank or trust company in the names of the governor and the attorney-general, payable only on the draft or check of the attorney-general, countersigned by the governor, and such disbursements shall be subject to no audit except by the governor and the attorney-general. The attorney-general, his deputy, or other officer, designated by him, is em-

powered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require that any books, records, documents or papers relevant or material to the inquiry be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor. It shall be the duty of all public officers, their deputies, assistants and subordinates, clerks and employees, and all other persons, to render and furnish to the attorney-general, his deputy or other designated officer, when requested, all information and assistance in their possession and within their power. Each deputy or other officer appointed or designated to conduct such inquiry shall make a weekly report in detail to the attorney-general, in form to be approved by the governor and the attorney-general, which report shall be in duplicate, one copy of which shall be forthwith, upon its receipt by the attorney-general, transmitted by him to the governor. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the governor or the attorney-general the name of any witness examined or any information obtained upon such inquiry, except as directed by the governor or the attorney-general, shall be guilty of a misdemeanor.

Pursuant to Executive Order, respondent CHARLES J. HYNES was appointed by the Governor of the State of New York to inquire into "possible criminal violations committed in connection with or in any way related to the management, control, operation or funding of any nursing home, care center, health facility or related entity located in the State of New York . . . " (22a).

Section 63 (3) of the Executive Law of the State of New York authorizes the Attorney General to conduct designated investigations, upon request of State agency heads. It provides as follows:

> 3. Upon request of the governor, comptroller, secretary of state, commissioner of transportation, superintendent of insurance, superintendent of banks, commissioner of taxation and finance or commissioner of motor vehicles, or the head of any other department, authority, division or agency of the state, investigate the alleged commission of any indictable offense or offenses in violation of the law which the officer making the request is especially required to execute or in relation to any matters connected with such department, and to prosecute the person or persons believed to have committed the same and any crime or offense arising out of such investigation or prosecution or both, including but not limited to appearing before and presenting all such matters to a grand jury.

By letters dated September 30, 1977, the Commissioner of Social Services and the Commissioner of Health of the State of New York requested the Attorney General of the State of New York to investigate indictable offenses by hospitals, their principles, agents suppliers or other persons connected therewith. (23-4). The Attorney General, in turn, by letter dated October 6th, 1977, authorized respondent to conduct the investigation as requested by the Commissioners of Social Services and Health (24-5).

It is in this respect that respondent, as Special Prosecutor, undertook an investigation of Brunswick Hospital Center, Inc., the largest such facility on Long Island.

Early in 1978, Brunswick Hospital voluntarily delivered its books and records to the Special Prosecutor, at the latter's request, and financed the expenses for two motel rooms to afford investigators in the empioy of the Special Prosecutor an opportunity to make their examination.

By order dated July 27th, 1978, the September 1978 Grand Jury III was convened by order of Suffolk County Supreme Court, on the affidavit of local Assistant District Attorney, who recited in his affidavit as follows:

> "CHARLES J. HYNES, Deputy Attorney General for the State of New York, (Special Prosecutor for Nursing Homes, Health and Social Services), requests a separate grand jury for the September 1978 term of the County Court. This grand jury will hear evidence concerning possible violations in the operation of nursing homes, private proprietary homes for adults, and hospitals in Suffolk County. A separate grand jury is requested because of the anticipated length of the investigation, the number of witnesses and the quantity of testimony involved." (39)

The books and records of Brunswick Hospital were produced before the September 1978 Grand Jury III by January of 1979, pursuant to subpoena duces tecum. Various witnesses were granted immunity by the grand jury, an automatic procedure in the state of New York which results from the appearance and testimony of a witness, pursuant to Section 190.40 of the Criminal Procedure Law of the State of New York. Thus, Leo Albert, the Comptroller of Brunswick Hospital appeared and testified. Various suppliers and numerous employees of Brunswick Hospital were afforded immunity and testified.

Both the New York Court of Appeals and the Appellate Division, Second Department agreed that insufficient evidence was produced before the first grand jury to justify any indictment or any charge of perjury or contempt against any witness, despite the fact that said grand jury had been extended on numerous occasions pursuant to court order. Thus, the September 1978 Grand Jury III was permitted to expire in June 1979, without any indictments being handed down.

It is in this posture that the Special Prosecutor made application for the convening of a new grand jury, the October 1979 Grand Jury III, without revealing to the Court that a prior grand jury had tracked the identical investigation of Brunswick Hospital and its employees and suppliers (33-6).

A subpoena duces tecum was issued in the name of this second jury, the October 1979 Grand Jury III and served upon the Chemical Bank to produce the bank records of petitioner, an employee of Brunswick Hospital.

Petitioner then commenced a civil proceeding in Suffolk County Supreme Court pursuant to Article 78 of the Civil Practice Law & Rules of the State of New York, in the nature of prohibition, to permanently stay the October 1979 Grand Jury III from conducting the identical investigation of Brunswick Hospital as did the September 1978 Grand Jury without Court authorization based upon a showing of probable cause justifying such a resubmission.

By judgment entered the 19th day of February, 1980, Suffolk County Supreme Court (McCarthy, J.) dismissed the petition (21-2).

On the 27th day of May, 1980, the Appellate Division, Second Department unanimously reversed the judgment of Suffolk County Supreme Court and granted the petition of petitioner, and thereby prohibited the grand jury investigation of Brunswick Hospital by the October 1979 Grand Jury III, "without prejudice to the Special Prosecutor to seek an order of resubmission." (18) The Appellate Division wrote as follows:

> "Special Term erred in holding that the petitioner, who is the Director of Nursing, Psychiatric Division, at Brunswick Hospital does not have standing to bring this proceeding. The Grand Jury is investigating Brunswick Hospital, its employees and suppliers. The petitioner, who has not been immunized or yet offered immunity, is thus a

potential target of the investigation. Moreover, the Special Prosecutor should have applied to the court for an order of resubmission. Our review of the minutes of the September, 1978 Grand Jury proceedings reveals that the Grand Jury sat on 28 separate occasions, heard testimony from 43 witnesses (some of whom were recalled on more than one occasion), and received numerous documents into evidence . . . Nevertheless, in spite of the Special Prosecutor's admission that he would not have too much more testimony for the entire case, he decided to withdraw the investigation from the Grand Jury on June 22, 1979, without a vote being taken. Our view of the record as of that date indicates that virtually no incriminating evidence had been adduced against Brunswick Hospital, its agents or suppliers. In other words, there was no concrete evidence on which a true bill could have been voted. It thus appears that withdrawal of the case from the September 1978 Grand Jury took place because of the possibility that the Grand Jury would vote against indictment. Under these circumstances, the Special Prosecutor should have obtained court approval for resubmission to the October 1979 Grand Jury . . . " In re McGinley v. Hynes, 75 A.D.2d 897 (2nd Dept., 1980) (16-17)

The Special Prosecutor chose not to obtain an order of resubmission and instead took an appeal to the New York Court of Appeals. That Court reversed the Appellate Division, and directed that the petition for a writ of prohibition be dismissed, holding that a target of a grand jury investigation is without any pre-indictment remedy to challenge prosecutorial misconduct by misuse of the grand jury, irrespective of violation of Constitutional perogative. The New York Court of Appeals recognized that the issue raised by the appeal was novel, writing as follows:

". . . (T)he role of a public prosecutor in our system of criminal justice has two fundamentally distinct and

separate aspects. On the one hand, the public prosecutor has the obligation of representing the State in its efforts to bring individuals accused of crimes to justice. When he is fulfilling this responsibility, the public prosecutor may readily be viewed as an officer performing a 'quasi-judicial' act and his conduct may therefore become the subject of an article 78 proceeding in the nature of prohibition . . . On the other hand, public prosecutors also perform a role 'analogous to that of a police officer,'' which entails the investigation of suspicious circumstances with a view toward determining whether a crime has been committed . . . . Manifestly, when this purely investigative function is involved, the acts of the public prosecutor are to be regarded as 'executive' in nature and, in consequence, cannot legitimately be the object of a writ of prohibition, except, perhaps, in a most unusual and at present unforeseeable circumstance . . . . In the instant situation, in contrast, none of the traditional characteristics of a judicial proceeding are present. No one has been accused of committing a crime, and, indeed, there is yet no concrete indication of any criminal wrongdoing. At this point, the role of the Special Prosecutor is limited to investigating the circumstances surrounding Brunswick's financial transactions and gathering testimony for the purposes of ascertaining whether a crime has been committed. Inasmuch as the activities of the Special Prosecutor in this role are related only to his 'executive' functions and are in no way connected with the 'quasi judicial' functions he may perform in other contexts, this cannot be considered a proper case for prohibition.'' In re McGinley v. Hynes, 51 N.Y.2d 116 (1980) (8-16)

A motion for reargument or for a stay and an amendment of the remittitur was denied by the New York Court of Appeals on November 13th, 1980 (1a).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that this Court should reexamine the principle enunciated sixty years ago in *United States v. Thompson,* 251 U.S. 407 (1920), that the Government need not get court permission to resubmit to a second Grand Jury, where a prior Grand Jury has failed to act. This ruling has been followed, without question. "A prior submission not acted upon, is not a bar to a later indictment." *United States v. Gross,* 416 F.2d 1205 (8th Cir., 1969).

It is conceded that "indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment." See, footnote 25, *Branzberg v. Hayes,* 408 U.S. 65 (1972). However, this does not mean that where a State does use a Grand Jury system, the procedures carried out are free from Constitutional scrutiny. "Historically (the grand jury) has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood v. Georgia,* 370 U.S. 375, 390 (1962). Given this fundamental role of the Grand Jury, where it is employed, it cannot seriously be urged that a prosecutor presenting his case before such body is free of all judicial supervision and may boundlessly carry out his role in any manner he elects, to achieve any objective, proper or not.

This Court has long recognized that a witness subpoenaed before a Grand Jury enjoys standing to protect his interests secured by the Constitution. In *United States v. Bryan,* 339 U.S. 323, 331 (1950) this Court wrote:

> "Certain exemptions from attending or, having attended, giving testimony are cognized by all courts. But every such exemption is grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth."

Thus, the issue crystalizes, whether due process of law is violated, by repeated presentations of a case to successive grand juries, without court supervision, where a prior grand jury has declined to act. It would clearly seem that such multitudinous search for a receptive or submissive grand jury by a prosecutor, spells out forum shopping in violation of due process of law, and harassment of the targets and witnesses of the investigation, whose privacy and business may well be jeopardized by repeated subpoenas issued to his employees, business contacts, friends and associates.

To take the position that no harm arises from successive, unsupervised grand jury presentments unless and until indictments are returned, fails to recognize the realities of the situation. In fact, one suffers serious harm in a very real sense, when his customers, suppliers, colleagues, employees, friends and/or family members are caused to appear and reappear at successive grand juries at the whim of an overzealous prosecutor. He is harmed when the investigation is reported in the media, whether such knowledge is obtained by the media as a result of improper leakage, or as a result of the filing of motions to quash oppressive, repetitive or otherwise improper subpoenas. He is harmed socially and in the business community when those who were compelled to testify are questioned about, and later discuss, the target's integrity, personal habits, finances, and other such matters. The inference drawn by the public is that the target must have committed some serious crime, or the prosecutor would not continue to inquire. The longer the prosecutor continues (or renews) the investigation, the stronger the in-

ference of guilt. A motivation by a prosecutor to destroy a target who may or may not be guilty of any crime, on the theory of "guilt by accusation" has no place in modern American jurisprudence.

In *United States v. Calandra,* 414 U.S. 338 (1974), this Court properly alerted the prosecutorial branch that the courts are not powerless to prohibit abuse of the grand jury system, where it surfaces:

> ". . . The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena duces tecum will be disallowed if it is far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment . . . Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs." (at p. 346)

It would be difficult to distinguish the resulting wrongs arising out of a "far too sweeping" subpoena, as opposed to numerous, unbridled, repetitive presentations of a case to a first grand jury, then to a second, third or more.

This Court has warned that the guarantee against double jeopardy is clearly applicable to State criminal prosecutions. *Waller v. Florida,* 397 U.S. 387 (1970); *Harris v. Oklahoma,* 433 U.S. 682 (1977). The Court did not content itself with enunciating the broad Constitutional principle, but alerted the States that nuances derived therefrom were applicable. Thus, the doctrine of collateral estoppel is encompassed within the double jeopardy safeguard and so, the same transaction may not be severed for multiple prosecutions. The Court wrote that the double jeopardy safeguard "surely protects a man who has been acquitted from having to run the gauntlet a second time." *Ashe v. Swenson,* 397 U.S. 436 (1970). It is this very type of "gauntlet," although not necessarily covered by the double jeopardy provision, that petitioner urges,

constituted an unconstitutional abuse of the grand jury system, by multiple, judicially unsupervised presentations to successive grand juries.

This Court is not prone to excuse Constitution infringement on the basis of adequate state grounds. Thus, in *Menna v. New York,* 423 U.S. 61 (1975), this Court reached the Constitutional issue, over the State's attempted refuge in its own procedures:

> "Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, a federal court requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."

It is therefore submitted that this Court should reexamine its sixty year old ruling which seems to allow multiple, unsupervised submissions of cases to successive grand juries, where the prior body failed to act. The issue presents a Constitutional problem that in light of modern day Constitutional thinking and the evolution of individual rights, calls for an updated reevaluation.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX A—DECISION OF COURT OF APPEALS

2 Mo. No. 1190

In the Matter of Barbara McGinley,
Respondent,

vs.

Charles J. Hynes, Deputy Attorney General,
Appellant,
and Chemical Bank,
Respondent.

Motion for reargument or for a stay and an amendment of the remittitur denied.

DECISION COURT OF APPEALS NOV. 13, 1980

APPENDIX B—OPINION OF NEW YORK STATE COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

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2 No. 428

In the Matter of Barbara McGinley,

Respondent,

v.

Charles J. Hynes, Deputy Attorney General,

Appellant,

& ano.,

Respondent.

(428) Charles J. Hynes, Deputy Attorney-General (Arthur Weinstein, Richard D. Carruthers, & Terrence P. Buckley of counsel) for respondent.

This opinion is uncorrected and subject to revision before publication in the New York Reports.

GARIELLI, J.:

In this article 78 proceeding, the Special Nursing Home Prosecutor appeals from an order of the Appellate Division, which granted petitioner's request for relief in the nature of prohibition and directed the Special Prosecutor to refrain from presenting additional evidence to the Grand Jury in connection with his investigation of a particular hospital without first seeking and obtaining judicial approval to "resubmit" pursuant to CPL 190.75 (subd. 3). The present appeal requires us to consider novel

questions concerning the availability of the prohibition remedy to prevent a prosecutor from carrying out his investigative functions when there is no claim that the subject matter of his investigation is beyond the scope of his prosecutorial authority. Because we conclude that prohibition does not lie under the circumstances presented in this case, we now reverse the order of the Appellate Division and direct that the petition for a writ of prohibition be dismissed.

The investigation in question was initially commenced before a Suffolk County Grand Jury on September 5, 1978. Assistant Special Prosecutor Richard Miller informed the Grand Jury at that time that it would be looking into possible rebate and kickback schemes in the various hospitals, adult homes, health-related facilities and nursing homes in Suffolk County with a view toward determining, among other things, whether the State's medicaid system had been defrauded. Of particular interest, the Grand Jury was told, were the financial activities of the Brunswick Nursing Center, a general hospital in Suffolk County. Suspicion had focused upon the Brunswick facility because, as the Grand Jury was later advised, an audit of that hospital's books by the Special Prosecutor's office had revealed some rather unusual business transactions between Brunswick and two of its regular suppliers.

From the outset, the Grand Jury's investigation of these matters was plagued with delays. Subpoenas had been issued commanding Brunswick and several of its suppliers to produce their records for the Grand Jury on September 5, but each of the vendors made immediate motions to quash and Brunswick requested a postponement to October 6, so that it would have an adequate opportunity to assemble the required material. The vendors' motions to quash were not finally resolved in favor of the Special Prosecutor until the middle of October, when the Appellate Division vacated its stays. By that time,

however, Brunswick had made its own motion to quash, despite its earlier promise to produce records by October 6. This motion delayed the production of Brunswick's records through the end of December, 1978.

Additional delays were occasioned by the recalcitrance of various witnesses. One of the vendors involved in the investigation failed to appear as scheduled because his attorney was "very busy." When he finally did appear two months later, he impeded the investigation by refusing to answer a number of crucial questions. His subsequent appearances before the Grand Jury were equally fruitless, and, as a consequence, a contempt proceeding was eventually commenced against him. The efforts to bring this witness before the Grand Jury dragged on through a chain of late appearances and outright failures to appear until the last month of the investigation. On several occasions during this period, the witness' appearance had to be postponed because his attorney either appeared late or did not show up at all. Indeed, even the efforts of the Trial Judge to conduct contempt proceedings were confounded by the refusal of this witness and his attorney to appear when commanded to do so.

The performance of this witness was not atypical. Several witnesses represented by the same attorney caused repeated delays as a result of their own or their attorney's failure to appear as scheduled. One of the other principals in the investigation also characteristically failed to be present on the dates he was scheduled to appear. A new series of motions to quash made in early 1979 by various witnesses produced additional delays and frustrations for the Grand Jurors. These difficulties were further compounded by the fact that many of the records subpoenaed by the Grand Jury either had been destroyed or simply could not be found.

Throughout the nine-month period of the Grand Jury session, representatives of the Special Prosecutor's office

were repeatedly compelled to ask for extensions of the Grand Jury's term so that all of the evidence could be heard. On each occasion, the Grand Jurors were told that every effort was being made to obtain the cooperation of witnesses and put an end to the delays and collateral proceedings. Although the Grand Jurors initially were receptive to the Special Prosecutor's requests for extensions, they began to express impatience as the months dragged on and the witnesses persisted in their dilatory tactics. At several points in the proceedings, individual members of the Grand Jury asked whether additional measures could be taken to hold the resistant witnesses and their attorneys accountable for their conduct. Additionally, a few of the Grand Jurors indicated that the repeated extensions of the investigation were beginning to disrupt their personal lives. Finally, at the May 25, 1979 session, the Grand Jurors took a vote among themselves and determined not to continue beyond the next scheduled termination date, June 22, 1979. Thus, although the Special Prosecutor had not had an opportunity fully to explore the evidence, the Grand Jury was disbanded without having taken any action in the Brunswick Nursing Center matter. It was apparent from the minutes of the Grand Jury sessions, however, that the decision of the Grand Jury to disband was based not upon its belief that no crime had been committed but, rather, upon the Grand Jurors' impatience with the repeated delays occasioned by the witnesses' recalcitrance.

A new Grand Jury was convened on October 1, 1979. Once again, a representative of the Special Prosecutor's office appeared and informed the Grand Jurors that they would be looking into the financial activities of the Brunswick Nursing Center with a view toward the possibility of medicaid fraud. Several witnesses were called to testify regarding the Brunswick matter, but the progress of the investigation was once again halted when a

Brunswick employee whose bank record had been subpoenaed commenced the instant article 78 proceeding in an effort to restrain the Special Prosecutor from pursuing the matter further.

The petition was based upon CPL 190.75 (subd 3), which provides that when a charge presented to a Grand Jury has been dismissed, "it may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge to the same or another grand jury". Although the first Grand Jury in the Brunswick Nursing Center case had been discharged before it had had an opportunity to consider and act upon any charges, petitioner argued that, under the circumstances, the Grand Jury's nonaction should have been treated as the equivalent of a dismissal for purposes of CPL 190.75 (subd 3) and the Special Prosecutor should therefore have been prohibited from proceeding before a second Grand Jury unless and until court approval was obtained.

Special Term did not directly address the merits of petitioner's contentions, but instead dismissed the petition upon the ground that the extraordinary remedy of prohibition was simply not justified under the facts of the case. The Appellate Division, however, disagreed, concluding that prohibition was available to prevent the prosecutor from acting "in excess of [his] powers" (*La Rocca v. Lane*, 37 NY2d 575, 579) in violation of CPL 190.75 (subd 3). The court then went on to hold that petitioner was a person with "standing" to bring the proceeding, since, as an employee of Brunswick, she was a potential target of the Special Prosecutor's investigation. Finally, reaching the merits of the dispute, the Appellate Division found that the Special Prosecutor had indeed exceeded the bounds of his authority by reviving the Brunswick investigation before a second Grand Jury without first obtaining judicial approval. Consequently, the Appellate Division held, petitioner was entitled to the requested relief.

We do not reach the merits of petitioner's contentions, however, because we conclude that prohibition does not lie under circumstances such as these.[1] The "ancient and just" writ of prohibition is available "only where there is a clear legal right and only when the body or officer 'acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction' " (*Matter of Dondi v. Jones,* 40 NY2d 8, 13, quoting *Matter of State of New York v. King,* 36 NY2d 59, 62; *Matter of Nigrone v. Murtagh,* 36 NY2d 421, 423-424; see *Matter of Vega v. Bell,* 47 NY2d 543, 546-547). The writ "must be directed to some inferior judicial tribunal or officer and lies to prevent or control judicial or quasi-judicial action only, as distinguished from legislative, executive or ministerial action" (*Matter of Forte v. Supreme Court of the State of New York,* 48 NY2d 179, 183; accord, *Matter of Nicholson v. State Comm on Judicial Conduct,* 50 NY2d 597, 606; *Matter of B T Prods v. Barr,* 44 NY2d 226, 231-232; *Matter of Steingut v. Gold,* 42 NY2d 311, 315; see *Matter of Kaney v. New York State Civ Serv Comm,* 190 Misc 944, 951, affd 273 App Div 1054, affd 297 NY 707; Note, The Writ of Prohibition in New York—Attempt to Circumscribe an Elusive Concept, 50 St. John's L Rev 76, 84). It is the latter aspect fo this oft-repeated formulation that causes the difficulty here.

We have recently had occasion to observe that "[a] public prosecutor is a quasi-judicial officer, who performs important duties within our judicial system, and is subject to prohibition under proper circumstances not alone confined to double jeopardy situations" (*Matter of Dondi v. Jones,* 40 NY2d 8, 13, *supra;* accord, *Matter of B T Prods v. Barr,* 44 NY2d 226, 232, *supra*). We have not yet had an opportunity, however, to articulate an analytical framework for determining precisely what circumstances

justify the issuance of a writ of prohibition against a public prosecutor, although we have found such a remedy to be appropriate in particular cases (*Matter of B T Prods v. Barr, supra; Matter of Dondi v. Jones, supra;* cf *Matter of Nicholson v. State Comm. on Judicial Conduct,* 50 NY2d 597, *supra*).

Essential to the development of such an analytical framework is a recognition that the role of a public prosecutor in our system of criminal justice has two fundamentally distinct and separate aspects. On the one hand, the public prosecutor has the obligation of representing the State in its efforts to bring individuals accused of crimes to justice. When he is fulfilling this responsibility, the public prosecutor may readily be viewed as an officer performing a "quasi-judicial" act, and his conduct may therefore become the subject of an article 78 proceeding in the nature of prohibition (see, eg, *Matter of Simonson v. Cahn,* 27 NY2d 1; *People v. Fielding,* 158 NY 542, 547; *Matter of Nolan v. Court of Gen Sessions of County of N Y,* 15 AD2d 78, affd 11 NY2d 114; *People ex rel Luetje v. Ketcham,* 45 Misc. 2d 802, 804). On the other hand, public prosecutors also perform a role "analogous to that of a police officer", which entails the investigation of suspicious circumstances with a view toward determining whether a crime has been committed (*Toker v. Pollak,* 44 NY2d 211, 220; see, also, Executive Law, §63). Manifestly, when this purely investigative function is involved, the acts of the public prosecutor are to be regarded as "executive" in nature and, in consequence, cannot legitimately be the object of a writ of prohibition, except, perhaps, in a most unusual and at present unforeseeable circumstance.

Of course, just as "there is no sharp line between a court acting in error * * * and a court acting in excess of its powers" (*La Rocca v. Lane,* 37 NY2d 575, 580, *supra*), there can be no bright, clear line separating the in-

vestigative activities of a public prosecutor from his "quasi-judicial" activities. Each case must be considered individually in accordance with its peculiar facts and without regard to mechanistic verbal formulations that serve no purpose other than to becloud the issues and confound reasoned analysis. Such a case-by-case approach is not unusual in our system of jurisprudence. "The law generally and the extraordinary remedy of prohibition has not developed as a linguistic exercise but as a response in language and concept to the recognized needs and accommodations in a society governed by the rule of law" (*La Rocca v. Lane, supra,* at p 581). Accordingly, although we have delineated in broad terms the outer limits of the "ancient and just writ", we have carefully avoided imposing a straitjacket of rigid rules and verbal formulae upon the prohibition remedy (see generally, Note, The Writ of Prohibition in New York—Attempt to Circumscribe an Elusive Concept, 50 St. John's L Rev 76, 101, *supra*). The distinction we draw today between those prosecutorial acts to which a writ may properly be directed and those which are not subject to prohibition is thoroughly consistent with this tradition.

While we decline on principle to define the precise boundaries of the "quasi-judicial" as distinguished from the "investigative" activities of a public prosecutor, we would nevertheless find no need to do so here, since the activities which petitioner seeks to enjoin fall clearly and unambiguously within the latter category. Pursuant to an Executive Order issued on February 7, 1975 (Executive Order No. 4, 9 NYCRR 3.4; see Executive Law, §63 [subd 8]) and to the specific requests of the Commissioner of Health and the Acting Commissioner of the Department of Social Services (see Executive Law, §63 [subd 3]), the Special Nursing Home Prosecutor was carrying out his mandate by looking into the possibility of corruption and medicaid fraud on the part of certain health care facilities

in Suffolk County. Although his investigation had focused upon Brunswick Nursing Center and some of that facility's suppliers, it had not yet progressed to a stage where individual wrongdoers had been identified or discrete chares of criminality raised. That the matter had been brought to the attention of a Grand Jury does not detract from our conclusion that no "quasi-judicial" activity was involved, since Grand Juries no less than public prosecutors have investigative as well as accusatory functions to perform in our system of criminal justice (see *Matter of Additional January 1979 Grand Jury v. Jane Doe,* 50 NY2d 14, 19; *People v. Calbud, Inc.,* 49 NY2d 389, 394). When a Grand Jury, aided by a public prosecutor, is carrying out its purely investigative role, it is no more subject to prohibition than is the prosecutor.[2]

We note that our holding today does not in any way conflict with prior cases in which we have recognized the availability of prohibition as a means to prevent a public prosecutor from acting in excess of his authority. In *Matter of B T Prods v. Barr,* (44 NY2d 226, *supra*), for example, we held that prohibition would lie to prevent the New York State Organized Crime Task Force from retaining property seized pursuant to a judicially issued warrant. Although we did not analyze in detail the nature of the acts sought to be enjoined there, it is evident from our discussion that we considered the acts of the prosecutor in that case to be "quasi-judicial" because they were logically inseparable from the acts of the court which had improperly issued the search warrant. In *Matter of Dondi v. Jones* (40 NY2d 8, 13, *supra*), we recognized that prohibition would be an appropriate remedy if it were found that a Special Prosecutor was exceeding the authority conferred upon him through Executive Order by prosecuting a particular criminal defendant under an existing indictment. Unlike the activities of the Special Prosecutor in the present situation, however, the prosecutorial acts at issue

in *Dondi* may readily be classified as "quasi-judicial", since in that case the matter had progressed well past the investigative, fact-finding stage and the function of the prosecutor had become purely that of an accuser (cf *Matter of Nicholson v. State Comm on Judicial Conduct,* 50 NY2d 597, *supra* [prohibition would lie to enjoin improper judicial conduct investigation which has a "chilling effect" upon protected First Amendment rights]). In the instant situation, in contrast, none of the traditional characteristics of a judicial proceeding are present. No one has been accused of committing a crime, and, indeed, there is yet no concrete indication of any criminal wrongdoing. At this point, the role of the Special Prosecutor is limited to investigating the circumstances surrounding Brunswick's financial transactions and gathering testimony for the purposes of ascertaining whether a crime has been committed. Inasmuch as the activities of the Special Prosecutor in this role are related only to his "executive" functions and are in no way connected with the "quasi-judicial" functions he may perform in other contexts, this cannot be considered a proper case for prohibition. Petitioner's remedy, if indeed she is entitled to remedy at all, lies solely in a traditional motion to quash the subpoena issued against her bank.[3]

1. In view of our conclusion that prohibition would not, in any event, lie, we find it unnecessary to comment upon the determination of the Appellate Division that petitioner had "standing" by reason of her status as a "potential target" for Grand Jury action.

2. The circumstances of the present case do not require us to consider whether prohibition would lie to enjoin a public prosecutor, who has not obtained judicial approval, from resubmitting *specific charges* against a *particular, named defendant* to a second Grand Jury after a prior Grand Jury has voted to dismiss or has been discharged without taking any action on the charge.

3. Petitioner has not contended that the investigation in question was not within the scope of the Special Prosecutor's executive authority as outlined in Executive Order No. 4 (9 NYCRR 3.4, *supra*). We note, however, that the traditional remedy of a motion to quash provides adequate protection to those who feel themselves aggrieved by the conduct of a public prosecutor who pursues an investigation in excess of his legitimate authority (see, e.g., *Matter of Additional January 1979 Grand Jury v. Jane Doe,* 50 NY2d 14, *supra; Matter of Mann Judd Landau v. Haynes,* 49 NY2d 128).

APPENDIX "C"
ORDER DATED MAY 27, 1980

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on May 27, 1980.

HON. JAMES D. HOPKINS, Justice Presiding
HON. LEON D. LAZER,
HON. JOHN P. COHALAN, JR.,
HON. FRANK D. O'CONNOR, *Associate Justices*

In the Matter of Barbara McGinley,

Appellant,

v.

CHARLES J. HYNES, Deputy Attorney General,

Respondent-respondent,

et al.,

Respondent.

In the above entitled cause pursuant to article 78, *inter alia,* to prohibit the Special Nursing Home Prosecutor from pursuing a Grand Jury investigation of Brunswick Hospital, its employees and suppliers, the above named Barbara McGinley, petitioner, having appealed to this court from a judgment of the Supreme Court, Suffolk County, entered February 25, 1980, which dismissed the petition; and the said appeal having been argued by

Stephen R. Taub, Esq., of counsel for the appellant and argued by Terrence P. Buckley, Esq., of counsel for Charles J. Hynes, Deputy Attorney-General, respondent *pro se,* due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously reversed, on the law, without costs or disbursements, and the petition granted, without prejudice to the Special Prosecutor to seek an order of resubmission.

Enter:
IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX D
OPINION

JAMES D. HOPKINS, J.P.
LEON D. LAZER
JOHN P. COHALAN, JR.
FRANK D. O'CONNOR, JJ.

April 2, 1980

In the Matter of Barbara McGinley,

Appellant,

v.

Charles J. Hynes, Deputy Attorney General,

Respondent-Respondent,

et al.

Respondent.

Stephen R. Taub, Lynbrook, N.Y. for appellant.
Charles J. Hynes, Deputy Attorney General, Hauppauge, N.Y. (Terrence P. Buckley Special Assistant Attorney General of counsel), respondent *pro se.*

In a proceeding pursuant to CPLR article 78 to, *inter alia,* prohibit the Special Nursing Home Prosecutor from pursuing a Grand Jury investigation of Brunswick Hospital, its employees and suppliers, the appeal is from a judgment of the Supreme Court, Suffolk County (MC-

Carthy, J.), entered February 25, 1980, which dismissed the petition.

Judgment reversed, on the law, without costs or disbursements, and petition granted, without prejudice to the Special Prosecutor to seek an order of resubmission.

Special Term erred in holding that the petitioner, who is the Director of Nursing, Psychiatric Division, at Brunswick Hospital does not have standing to bring this proceeding. The Grand Jury is investigating Brunswick Hospital, its employees and suppliers. The petitioner, who has not been immunized or yet offered immunity, is thus a potential target of the investigation. Moreover, the Special Prosecutor should have applied to the court for an order of resubmission. Our review of the minutes of the September, 1978 Grand Jury proceedings reveals that the Grand Jury sat on 28 separate occasions, heard testimony from 43 witnesses (some of whom were recalled on more than one occasion), and received numerous documents into evidence. At the conclusion of the May 25, 1979 session, the following colloquy transpired between the Special Prosecutor (Mr. Puckley) and two of the Grand Jurors:

"MR. BUCKLEY: Yes. My plan right now is to bring Mr. Director in first and do some questioning until a certain hour. I don't expect too much longer with Mr. King, but I would like to get Mr. Director in at the beginning as soon as they are here, and finish off Mr. King before we adjourn for the day.

"A JUROR: Do you feel once you get Mr. Director out of the way and Mr. King, that you wouldn't have much more testimony in this entire case."

"MR. BUCKLEY: I think not, as far as I am concerned.

"THE PREVIOUS JUROR: So would it be possible to extend say to the end of June and recess for the

summer and come back in September?

"MR. BUCKLEY: Sure.

"THE PREVIOUS JUROR: We'd like to think about something like that.

"MR. BUCKLEY: Something like that would be possible."

Nevertheless, in spite of the Special Prosecutor's admission that he would not have too much more testimony for the entire case, he decided to withdraw the investigation from the Grand Jury on June 22, 1979, without a vote being taken. Our view of the record as of that date indicates that virtually no incriminating evidence had been adduced against Brunswick Hospital, its agents or suppliers. In other words, there was no concrete evidence on which a true bill could have been voted. It thus appears that withdrawal of the case from the September, 1978 Grand Jury took place because of the possibility that the Grand Jury would vote against indictment. Under these circumstances, the Special Prosecutor should have obtained court approval for resubmission to the October, 1979 Grand Jury (see *People v. Rodriguez,* 11 NY2d 279; see, also, *People v. Nicholas,* 35 AD2d 18).

The Special Prosecutor argues before this court that he never actually finished his investigation and thus an order of resubmission was not necessary. We disagree because the record reveals otherwise. As noted earlier, on May 25, 1979, the Special Prosecutor informed the prior Grand Jury that he had only a few witnesses remaining until the end of the case. Nevertheless, after hearing all or most of these remaining few witnesses, he withdrew the investigation. However, a review of the minutes of the proceedings before the October, 1979 Grand Jury shows that, before this court stayed all further proceedings, testimony had been heard from 12 witnesses, only one of whom appeared before the prior Grand Jury. In addition, the

Special Prosecutor informs us that there are 11 remaining prospective witnesses, 9 of whom did not testify before the previous Grand Jury. It would seem, then, that the Special Prosecutor's admission to the September, 1978 Grand Jury that he only had a few remaining witnesses was either erroneous or misleading. In either event, the nature of the new investigation, based upon the testimony of almost entirely different witnesses, indicates that it is not merely a more complete presentation of that which was attempted before the prior Grand Jury. Our conclusion is that the Special Prosecutor must seek an order of resubmission if he is to continue his investigation of this matter (See CPL 190.75).

HOPKINS, J.P., LAZER, COHALAN and O'CONNOR, JJ., Concur.

APPENDIX E
MEMORANDUM

BY MC CARTHY, J.S.C.
DATED January 29, 1980

SUPREME COURT, SUFFOLK COUNTY

In the Matter of the Application of
BARBARA MC GINLEY,

Petitioner,

vs.

HON. CHARLES J. HYNES, Deputy Attorney General and CHEMICAL BANK,

Respondents.

STEPHEN R. TAUB
Attorney for Petitioner
8 Freer Street, Suite 205
Lynbrook, New York 11563

CHARLES J. HYNES, Deputy Attorney General
Attorney for Respondents
New York State Office Bldg., Room 4A10
Veterans Memorial Highway
Hauppauge, New York 11787

In this Article 78 proceeding, petitioner, Barbara Mc Ginley, seeks to prohibit respondent, Charles J. Hynes, from pursuing an investigation of Brunswick Hospital

Centre, Inc., its agents and employees, before the "October Grand Jury III" and to prohibit production by respondent, Chemical Bank, of any and all bank records designated in a subpoena duces tecum served on the said bank.

It appears from the petition that petitioner is an employee of the Brunswick Hospital Centre, Inc., being currently Director of Brunswick House, Inc., a facility of the centre. Petitioner has not been subpoenaed to testify before this Grand Jury nor have any of her records been subpoenaed, though the subpoena served upon the bank requires the production of bank records which, inter alia, includes the records of an account of the petitioner.

The extraordinaryr emedy of prohibition lies only where there is a clear legal right and only when the body or officer "acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in the proceeding over which it has jurisdiction" (B. T. Productions v. Barr, 44 NY2d 226, 231, 405 NYS2d 9, 11). Public prosecutors are quasi-judicial officers for the purposes of a writ of prohibition in a proper case (See Matter of Dondi Jones, 40 NY2d 13, 386 NYS2d 8). Is this a proper case? The Court thinks not.

Petitioner is a mere employee of the Brunswick Hospital Centre and, in the opinion of the Court, not possessed of the right to prohibit the Special Prosecutor from proceeding with his investigation. Even if the Special Prosecutor is exceeding his jurisdiction or power, the extraordinary remedy of prohibition will not lie if there is an adaequate remedy at law (Matter of State of New York v. King, 36 NY2d 59, 62, 364 NYS2d 879, 881; Application of Scotti, 53 AD2d 282, 385 NYS2d 659, 662).

Further, the papers in support of the application are based upon hearsay, conjecture and surmise and the Court is not convinced that the facts are as alleged by petitioner,

that the Special Prosecutor is proceeding in excess of his jurisdiction. On familiar principles, even a witness is not entitled to challenge the authority of the Court or the Grand Jury provided they have a de facto existence and organization (Blair v. United States, 250 US 273, 39 S Ct. 468, 63 L. Ed. 979) and even petitioner admits that this Grand Jury has de facto existence. From an examination of the submissions in the proceeding it would appear that the "October Grand Jury III" has authority and organization to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction (L & S. Hosp. & Inst. Supplies v. Hynes, 51 AD2d 515, 378 NYS2d 78).

By way of alternate relief, petitioner's attorney requests that the application be viewed as a motion to quash the subpoena should the Court conclude such a motion would be more appropriate. If the application is so viewed, it is untimely as it should have been made prior to the return date of the subpoena (Santangelo v. People, 38 NY2d 536, 381 NYS2d 472). Even if such procedural objection be overlooked, the case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of such third party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued. (United States v. Miller, 425 US 435, 96 S. Ct. 1619, 48 L. Ed.2d 71; Shapiro v. Chase Manhattan Bank, 53 AD2d 542, 384 NYS2d 795). Petitioner can assert neither ownership nor possession of the bank records. She has "no reasonable expectation of privacy" (Democratic County Committee of Bronx Co. v. Nadjari, 52 AD2d 70, 383 NYS2d 311; People v. Santucci, 89 Misc. 2d 943, 392 NYS2d 996).

The petition has no merit and must be dismissed.

Settle judgment.

s/John G. McCarthy
J.S.C.

APPENDIX F
EXHIBITS: VARIOUS LETTERS

EXECUTIVE ORDER

The Honorable Louis J. Lefkowitz
Attorney General of the State of New York
State Capitol
Albany, New York

WHEREAS, On January 10, 1975 Charles J. Hynes was appointed by you as Deputy Attorney General to act as Special Prosecutor to inquire into possible criminal violations in the nursing home industry and related matters; and

WHEREAS, on February 4, 1975 you requested, on behalf of Deputy Attorney General Charles J. Hynes, authorization to exercise the powers provided for by Executive Law section 63, subdivision 8, in order that Deputy Attorney General Hynes might fully exercise his responsibilities in connection with the investigation of the nursing home industry;

NOW, THEREFORE, pursuant to subdivision 8 of section 63 of the Executive Law, and in accordance with the statute and law in such case *** and provided, I find it to be in the public interest to require that you inquire into matters concerning the public peace, public safety and public justice with respect to possible criminal violations committed in connection with or in any way related to the management, control, operation, funding of any nursing home, care center, health facility or related entity located in the State of New York, or any principal, agent, supplier or other person involved therewith, and I so direct you to do so in person by your assistant or deputies and to have the powers and duties specified in such subdivision 8 for the purpose of this requirement.

GIVEN under my hand and the Privy Seal of the State at the Capitol in the City of Albany this seventh day of February in the year of our Lord one thousand nine hundred seventy five.

s/Hugh L. Carey

THE GOVERNOR

NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES

September 30, 1977

Hon. Louis J. Lefkowitz
Attorey General
State of New York
Two World Trade Center
New York, New York

Dear General Lefkowitz:

Pursuant to Section 63(3) of the Executive Law, I hereby request that your office investigate the alleged commission of any indictable offense or offenses in violation of the Social Services Law or in relation to any matters connected with the New York State Department of Social Services by hospitals subject to the provisions of the Social Services Law, their principals, agents, suppliers or other persons connected or involved therewith, and that you prosecute the person or persons believed to have committed the same or any crime or offense arising out of your investigation or prosecution or both.

Very truly yours,
s/Carmen Shang

STATE OF NEW YORK
DEPARTMENT OF HEALTH

September 30, 1977

Dear General Lefkowitz:

Pursuant to Section 63(3) of the Executive Law, I hereby request that your office investigate the alleged commission of any indictable offense or offenses in violation of the Public Health Law or in relation to any matters connected with the New York State Department of Health by hospitals subject to the provisions of Article 28 of the Public Health Law, their principals, agents, suppliers or other persons connected or involved therewith; and that you prosecute the person or persons believed to have committed the same or any crime or offense arising out of your investigation or prosecution or both.

Sincerely yours,
s/Robert P. Whalen
Robert P. Whalen, M.D.
Commissioner of Health

Honorable Louis J. Lefkowitz
Attorney General
State of New York
Two World Trade Center
New York, N.Y. 10047

OCTOBER 6, 1977

Dear Deputy Attorney General Hynes:

I have received the attached requests from the Commissioner of Health and the Acting Commissioner of Social Services that I conduct an investigation and, if indicated, prosecutions, pursuant to Section 63(3) of the Executive Law. I hereby designate you as my Deputy to exercise all the powers conferred upon me by this Section in such investigations and prosecutions.

I enclose the original written requests referred to above received from Commissioner Robert P. Whalen and Acting Commissioner Carmen Shang, both dated September 10, 1977.

This assignment shall supplement the authority you received upon your appointment as my Deputy on January 10, 1975 to perform all the functions and to exercise all the powers conferred upon the Attorney General. Please be advised that similar designations are required for each of these special assistants or other attorneys employed hereafter that you notify me will be handling such matters.

Sincerely,
LOUIS J. LEFKOWITZ
Attorney General

Hon. Charles J. Hynes
270 Broadway
New York, N.Y. 10007

APPENDIX G
ORDER EXTENDING THE TERM OF THE 1978 SEPTEMBER GRAND JURY NUMBER III

At a Term, Part V of the County Court of Suffolk County, held at the Criminal Courts Building, Center Drive South, Riverhead, New York on the 1st day of June, 1979.

PRESENT:
HON. HARRY E. SEIDELL
County Court Judge

In the Matter of the Application of CHARLES J. HYNES, Special Deputy Attorney General, for an Order Extending the September 1978 Term of the County Court and the Term of the September GRAND JURY NUMBER III to June 22, 1979

It appearing from the attached affidavits and applications of Terrence P. Buckley, Special Assistant Attorney General of the State of New York (Special Prosecutor), and Roger Kendall, Foreman of the September 1978 GRAND JURY NUMBER III, that the Grand Jury is currently investigating criminal activities in Suffolk County involving a hospital and a nursing home; that it is necessary that additional testimony be heard by said Grand Jury for the proper and complete presentation and consideration of the aforesaid matters now pending before it; that the Grand Jury has not completed, nor will be able to complete its business currently pending as described above before the expiration of its Term on June 1, 1979; that the necessary additional testimony cannot be completed by June 1, 1979, and that the application made

herein was authorized by the affirmative vote of a majority of the above-captioned Grand Jury; therefore it is

ORDERED, that the September 1978 Term of the County Court of Suffolk County and the Term of the September 1978 GRAND JURY NUMBER III be and the same is hereby extended to and including June 22, 1979.

ENTER,
s/Harry E. Seidell
HARRY E. SEIDELL
COUNTY COURT JUDGE,
COUNTY OF SUFFOLK

Granted
June 1, 1979

APPENDIX H—AFFIDAVIT OF TERRENCE P. BUCKLEY AND APPLICATION

COUNTY COURT
COUNTY OF SUFFOLK

In the Matter of the Application of

CHARLES J. HYNES, Special Deputy Attorney General, for an Order Extending the September 1978 Term of the County Court and the Term of the September GRAND JURY NUMBER III to

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STATE OF NEW YORK)
SS:
COUNTY OF SUFFOLK)

TERRENCE P. BUCKLEY, being duly sworn deposes and says:

I am a Special Assistant Attorney General of the Stte of New York (Special Prosecutor) in the Long Island Office of Charles J. Hynes, Deputy Attorney General, appointed by Attorney General Louis Lefkowitz on January 10, 1975. That appointment was made in connection with the requests of the Honorable Abe Levine, Commissioner of the New York State Department of Social Services, and the Honorable Hollis Ingraham, Commissioner of the New York State Department of Health, made pursuant to the provisions of Section 63, subdivision 3 of the Executive Law. In October of 1977, Deputy Attorney General Hynes' authority was supplemented to include investigation, and if need be, prosecution of hospitals in New York State.

The Office of the Deputy Attorney General is required to investigate the alleged commission of any indic-

table offense or offenses in violation of the Public Health Law or the Social Service Law, or in relation to any matters connected with the New York State Department of Health or the New York State Department of Social Services, by hospitals, adult homes, nursing entities, and entities subject to the provisions of Article 28 of the Public Health Law, located in the State of New York, and principals, agents, suppliers, and other persons connected or involved therewith; and it is furthermore the duty of the Office of the Deputy Attorney General to prosecute the person or persons believed to have committed the same or any crimes or offenses arising out of the described investigations or prosecutions or both.

In connection with the described investigative and prosecutorial responsibilities, the Office of the Deputy Attorney General (Special Prosecutor) has presented, and is currently presenting, evidence concerning the above-described investigations to the September 1978 Suffolk County GRAND JURY NUMBER III. This Grand Jury was empanelled on September 5, 1978 by the Honorable Harry E. Seidell, County Court Judge.

At the present time, there is pending before the Grand Jury, investigations concerning a hospital and a nursing home.

Each of the investigations referred to above involves a complicated financial fraud. In order to properly investigate such a case it is necessary to scrutinize the books and records of the institution as well as various businesses dealing with the institution. One of the reasons that this Grand Jury has been unable to complete its business is that several of its subpoenas have not yet been complied with. Until such compliance takes place the Grand Jury will be unable to complete its currently pending investigations.

The Office of the Deputy Attorney General plans to call several additional witnesses before, the Grand Jury will be in a position to conclude these investigations. It is

clear to me that this Grand Jury will require an extension of their term for at least 3 weeks to properly conclude each investigation.

Based upon all of the above, it is my declaration that the September GRAND JURY NUMBER III for the County of Suffolk has not completed, nor will be able to complete its stated business before the expiration of its present term on June 1, 1979.

WHEREFORE, it is requested that this Honorable Court extend the term of the County Court of the County of Suffolk, and the term of the September 1978 GRAND JURY NUMBER III to and including.

Dated: Hauppauge, New York
May 31, 1978

s/Terrence P. Buckley
TERRENCE P. BUCKLEY
Special Assistant
Attorney General

Sworn to
May 31st, 1979

APPENDIX I
PETITION AND AFFIDAVIT OF ROGER KENDALL

COUNTY COURT
COUNTY OF SUFFOLK

In the Matter of the Application of

CHARLES J. HYNES, Special Deputy Attorney General, for an Order Extending the September 1978 Term of the County Court and the Term of the September GRAND JURY NUMBER III to

---

TO THE COUNTY COURT OF SUFFOLK COUNTY:

The petition of Roger Kendall, respectfully shows to the Court as follows:

I am the Foreman of the September GRAND JURY NUMBER III and make this application pursuant to the affirmative vote of the Grand Jury.

I have read the attached affidavit and application of Terrence P. Buckley, and reaffirm those statements made with respect to the investigations being conducted by the Grand Jury.

It is the declaration of the September GRAND JURY NUMBER III, through myself as its Foreman, after a vote duly taken, that the Grand Jury has not yet completed those matters before June 1, 1979, the date on which the September 1978 Term of the Court and the Term of the above-captioned Grand Jury expires.

THEREFORE, the Grand Jury, through myself, after a vote duly taken, joins in the application of the Deputy Attorney General for an Order extending the September 1978 Term of the Court, and the Term of the September GRAND JURY NUMBER III to and including June 27, 1977.

s/Roger Kendall
ROGER KENDALL, Foreman
September Grand Jury Number III

Sworn to
June 1st, 1979

APPENDIX J
ORDER AUTHORIZING EMPANELLING OF ADDITIONAL GRAND JURIES

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Suffolk, at Chambers, Broadway, Amityville, New York, on the 23rd day of August, 1979.

PRESENT:
HON. ARTHUR M. CROMARTY
Justice of the Supreme Court

In the Matter of the Application of

PATRICK HENRY, District Attorney of Suffolk County for an Order Authorizing the Empanelling of Two Additional Grand Juries for the OCTOBER Term of the County Court of Suffolk County.

An application having been made by PATRICK HENRY, District Attorney of Suffolk County, by petition of IRA H. SIMON, Assistant District Attorney, verified August 21, 1979, for the empanelling of two additional grand juries for the OCTOBER term of the County Court of Suffolk County.

Now, upon reading said petition, and due deliberation having been had thereon, the undersigned, Administrative Judge having jurisdiction of the County Court of Suffolk County, pursuant to Criminal Procedure Law Section 190.10 and 22 NYCRR 693.3, does hereby

ORDER and DIRECT that in addition to the regular County Court grand jury, two additional grand juries be empanelled for the OCTOBER term of the County Court, said grand juries to be referred to as OCTOBER GRAND

JURY NUMBER I and OCTOBER GRAND JURY NUMBER II and OCTOBER GRAND JURY NUMBER III respectively, and it is

ORDERED AND DIRECTED that the Commissioner of Jurors summon such additional jurors as are necessary to empanel OCTOBER GRAND JURY NUMBER II and OCTOBER GRAND JURY NUMBER III.

ENTER,
s/Arthur M. Cromarty
Justice of the Supreme Court

Granted
August 23, 1979

PETITION FOR ORDER AUTHORIZING EMPANELLING OF ADDITIONAL GRAND JURIES

SUPREME COURT OF THE STATE OF NEW YORK

In the Matter of the Application of

PATRICK HENRY, District Attorney of Suffolk County, for an Order Authorizing the Empanelling of Two Additional Grand Juries for the OCTOBER Term of the County Court of Suffolk County.

TO THE SUPREME COURT OF SUFFOLK COUNTY:

The petition of IRA H. SIMON, respectfully shows to the Court as follows:

I am an Assistant District Attorney of Suffolk County in charge of the Grand Jury Bureau, authorized by PATRICK HENRY, the District Attorney of Suffolk County, to make this application.

This application is made to the Court for an order authorizing the empanelling of two additional grand juries for the OCTOBER term of the County Court, and is made pursuant to Section 190.10 of the Criminal Procedure Law, and 22 NYCRR 693.3.

The volume of cases received by the District Attorney's office for prosecution from the various police agencies of Suffolk County has increased substantially in the last few years. The number of cases received from the investigative units of the District Attorney's office has likewise increased substantially in the last few years.

CHARLES J. HYNES, Deputy Attorney General for the State of New York, (Special Prosecutor for Nursing Homes, Health and Social Services), requests a separate grand jury for the OCTOBER 1979 term of the County Court. This grand jury will hear evidence concerning possible criminal violations in the operation of nursing homes, private proprietary homes for adults, hospitals, and the Medicaid system in Suffolk County. A separate grand jury is requested because of the anticipated length of the investigation, the number of witnesses, and the quantity of testimony involved.

The District Attorney now occupies a portion of the Criminal Courts Building, Center Drive South, Riverhead, New York, and a portion of the H. Lee Dennison Building, Veterans Memorial Highway, Hauppauge, New York. These facilities both contain grand Jury rooms, making possible the use of two grand juries simultaneously.

The use of two grand juries simultaneously will allow greater flexibility in the scheduling of the ever increasing number of felony cases.

In addition to the greater number of cases, recent changes in the law governing the prosecution of crimes require ever increasing amounts of time in preparing and presenting cases to the grand jury.

The presentation of cases based upon felony complaints filed in the lower criminal courts will be greatly speeded up, thus reducing the number of persons incarcerated or on bail pending grand jury action.

There will be additional time available for the investigative functions of the grand jury and less need to extend the term of grand juries.

No previous application has been made for the relief requested herein.

WHEREFORE, it is respectfully requested that an order authorizing that, in addition to the regular grand jury, two additional grand juries be empanelled for the OCTOBER term of the County Court of Suffolk County, said grand juries to be referred to as OCTOBER GRAND JURY NUMBER I, and OCTOBER GRAND JURY NUMBER II, and OCTOBER GRAND JURY NUMBER III, respectively.

s/Ira H. Simon
IRA H. SIMON

Verified by
Ira H. Simon
August 21st, 1979

APPENDIX K
ORDER AUTHORIZING EMPANELLING OF ADDITIONAL GRAND JURIES

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Suffolk, at Chambers, Broadway, Amityville, New York, on the 27th day of July, 1978

PRESENT:
HON. ARTHUR M. CROMARTY
Justice of the Supreme Court

In the Matter of the Application of

PATRICK HENRY, District Attorney of Suffolk County, for an Order Authorizing the Empanelling of Two Additional Grand Juries for the September Term of the County Court of Suffolk County.

An application having been made by PATRICK HENRY, District Attorney of Suffolk County, by petition of IRA H. SIMON, Assistant District Attorney, verified July 26, 1978, for the empanelling of two additional grand juries for the September term of the County Court of Suffolk County.

Now, upon reading said petition, and due deliberation having been had thereon, the undersigned, Administrative Judge having jurisdiction of the County Court of Suffolk County, pursuant to Criminal Procedure Law Section 190.10 and 22 NYCRR 693.3, does hereby

ORDER and DIRECT that in addition to the regular County Court grand jury, two additional grand juries be empanelled for the September term of the County Court,

said grand juries to be referred to as SEPTEMBER GRAND JURY NUMBER I, SEPTEMBER GRAND JURY NUMBER II and SEPTEMBER GRAND JURY NUMBER III respectively, and it is

ORDERED AND DIRECTED that the Commissioner of Jurors summon such additional jurors as are necessary to empanel SEPTEMBER GRAND JURY NUMBER II and SEPTEMBER GRAND JURY NUMBER III.

ENTER,
ARTHUR M. CROMARTY
J.S.C.

Granted
July 27, 1978

PETITION FOR ORDER AUTHORIZING EMPANELLING OF ADDITIONAL GRAND JURIES

SUPREME COURT OF THE STATE OF NEW YORK

In the Matter of the Application of

PATRICK HENRY, District Attorney of Suffolk County, for an Order Authorizing the Empanelling of Two Additional Grand Juries for the September Term of the County Court of Suffolk County

---

TO THE SUPREME COURT OF SUFFOLK COUNTY:

The petition of IRA H. SIMON, respectfully shows to the Court as follows:

I am an Assistant District Attorney of Suffolk County in charge of the Grand Jury Bureau, authorized by

PATRICK HENRY, the District Attorney of Suffolk County, to make this application.

This application is made to the Court for an order authorizing the empanelling of two additional grand juries for the September term of the County Court, and is made pursuant to Section 190.10 of the Criminal Procedure Law and 22 NYCRR 693.3.

The volume of cases received by the District Attorney's office for prosecution from the various police agencies of Suffolk County has increased substantially in the last few years. The number of cases received from the investigative units of the District Attorney's office has likewise increased substantially in the last few years.

CHARLES J. HYNES, Deputy Attorney General for the State of New York, (Special Prosecutor for Nursing Homes, Health and Social Services), requests a separate grand jury for the September 1978 term of the County Court. This grand jury will hear evidence concerning possible criminal violations in the operation of nursing homes, private proprietary homes for adults, and hospitals in Suffolk County. A separate grand jury is requested because of the anticipated length of the investigation, the number of witnesses, and the quantity of testimony involved.

The District Attorney now occupies a portion of the Criminal Courts Building, Center Drive South, Riverhead, New York, and a portion of the H. Lee Dennison Building, Veterans Memorial Highway, Hauppauge, New York. These facilities both contain grand jury rooms, making possible the use of three grand juries simultaneously.

The use of three grand juries simultaneously will allow greater flexibility inthe scheduling of the ever increasing number of felony cases.

In addition to the greater number of cases, recent changes in the law governing the prosecution of crimes re-

quire ever increasing amounts of time in preparing and presenting cases to the grand jury.

The presentation of cases based upon felony complaints filed in the lower criminal courts will be greatly speeded up, thus reducing the number of persons incarcerated or on bail pending grand jury action.

There will be additional time available for theinvestigative functions of the grand jury and less need to extend the term of grand juries.

No previous application has been made for the relief requested herein.

WHEREFORE, it is respectfully requested that an order authorizing that, in addition to the regular grand jury, two additional grand juries be empanelled for the September term of the County Court of Suffolk County, said grand juries to be referred to as SEPTEMBER GRAND JURY NUMBER I, and SEPTEMBER GRAND JURY NUMBER II, and SEPTEMBER GRAND JURY NUMBER III, respectively.

s/
IRA H. SIMON

Verified by
Ira H. Simon
July 26th, 1978

APPENDIX L
ORDER EXTENDING THE TERM OF THE 1978 SEPTEMBER GRAND JURY NUMBER III

At a Term, Part of the County Court of Suffolk County, held at the Criminal Courts Building, Center Drive South, Riverhead, New York on the 29th day of September, 1978.

PRESENT:
HON. HARRY E. SEIDELL
County Court Judge

In the Matter of the Application of

CHARLES J. HYNES, Special Deputy Attorney General, for an Order Extending the September 1978 Term of the County Court and the Term of the September GRAND JURY NUMBER III to January 2, 1979

It appearing from the attached affidavits and applications of Richard A. Mille, Special Assistant Attorney General of the State of New York (Special Prosecutor), and Roger Kendall, Foreman of the September 1978 GRAND JURY NUMBER III, that the Grand Jury is currently investigating criminal activities in Suffolk County involving two hospitals, a nursing home and several adult homes; that it is necessary that additional testimony be

heard by said Grand Jury for the proper and complete presentation and consideration of the aforesaid matters now pending before it; that the Grand Jury has not completed, nor will be able to complete its business currently pending as described above before the expiration of its Term on October 2, 1978; that the necessary additional testimony cannot be completed by October 2, 1978, and that the application made herein was authorized by the affirmative vote of a majority of the above-captioned Grand Jury; therefore it is

ORDERED, that the September 1978 Term of the County Court of Suffolk County and the Term of the September 1978 GRAND JURY NUMBER III be and the same is hereby extended to and including January 2, 1979.

s/Harry E. Seidell
HARRY E. SEIDELL
County Court Judge, County of Suffolk

Granted
September 29, 1978

APPENDIX M—AFFIDAVIT OF RICHARD A. MILLER AND APPLICATION

COUNTY COURT
COUNTY OF SUFFOLK

In the Matter of the Application of

CHARLES J. HYNES, Special Deputy Attorney General, for an Order Extending the September 1978 Term of the County Court and the Term of the September GRAND JURY NUMBER III to January 2, 1979

STATE OF NEW YORK)
ss:
COUNTY OF SUFFOLK)

RICHARD A. MILLER, being duly sworn, deposes and says:

I am a Special Assistant Attorney General of the State of New York (Special Prosecutor) in charge of the Long Island Office of Charles J. Hynes, Deputy Attorney General, appointed by Attorney General Louis Lefkowitz on January 10, 1975. That appointment was made in connection with the requests of the Honorabale Abe Levine, Commissioner of the New York State Department of Social Services, and the Honorable Hollis Ingraham, Commissioner of the New York State Department of Health, made pursuant to the provisions of Section 63, subdivision 3 of the Executive Law. In October of 1977, Deputy Attorney General Hynes' authority was supplemented to include investigation, and if need be, prosecution of hospitals in New York State.

The Office of the Deputy Attorney General is required to investigate the alleged commission of any indictable offense or offenses in violation of the Public Health Law or the Social Service Law, or in relation to any matters connected with the New York State Department of Health or the New York State Department of Social Services, by hospitals, adult homes, nursing homes, health related facilities, care centers and related entities, and entities subject to the provisions of Article 28 of the Public Health Law, located in the State of New York, and principals, agents, suppliers, and other persons connected or involved therewith; and it is furthermore the duty of the Office of the Deputy Attorney General to prosecute the person or persons believed to have committed the same or any crimes or offenses arising out of the described investigations or prosecutions or both.

In connection with the described investigative and prosecutorial responsibilities, the Office of the Deputy Attorney General (Special Prosecutor) has presented, and is currently presenting, evidence concerning the above-described investigations to the September 1978 Suffolk County GRAND JURY NUMBER III. This Grand Jury was empanelled on September 5, 1978 by the Honorable Harry E. Seidell, County Court Judge.

At the present time, there is pending before the Grand Jury investigations concerning two hospitals, one nursing home and several adult homes.

Each of the investigations referred to above involves a complicated financial fraud. In order to properly investigte such a case it is necessary to scrutinize the books and records of the institution as well as various businesses dealing with the institution. One of the reasons that this Grand Jury has been unable to complete its business is that several of its subpoenas for books and records have not yet been complied with. Until those records have been produced before the Grand Jury, it is senseless for the Grand

Jury to proceed with an examination of the individuals who operate those businesses.

The Office of the Deputy Attorney General plans to call several dozen additional witnesses before the Grand Jury will be in a position to conclude these investigations. A substantial portion of those witnesses must testify about complicated record keeping and accounting practices. It is clear to me that this Grand Jury will require an extension of their term for at least three months to properly conclude each investigation.

Based upon all of the above, it is my declaration that the September GRAND JURY NUMBER III for the County of Suffolk has not completed, nor will be able to complete its stated business before the expiration of its present term on October 2, 1978.

WHEREFORE, it is requested that this Honorable Court extend the term of the County Court of the County of Suffolk, and the term of the September 1978 GRAND JURY NUMBER III to and including January 2, 1979.

Dated: Hauppauge, New York
September 28, 1978

s/Richard A. Miller
RICHARD A. MILLER

Sworn to
September 28, 1978

APPENDIX N—PETITION AND AFFIDAVIT

COUNTY COURT
COUNTY OF SUFFOLK

In the Matter of the Application of

CHARLES J. HYNES, Special Deputy Attorney General, for an Order Extending the September 1978 Term of the County Court and the Term of the September GRAND JURY NUMBER III to January 2, 1979.

TO THE COUNTY COURT OF SUFFOLK COUNTY:

The petition of Roger Kendall, respectfully shows to the Court as follows:

I am the Foreman of the September GRAND JURY NUMBER III and make this application pursuant to the affirmative vote of the Grand Jury.

I have read the attached affidavit and application of Richard A. Miller, and reaffirm those statements made with respect to the investigations being conducted by the Grand Jury.

It is the declaration of the September GRAND JURY NUMBER III, through myself as its Foreman, after a vote duly taken, that the Grand Jury has not yet completed the matters before October 2, 1978, the date on which the September 1978 Term of the Court and the term of the above-captioned Grand Jury expires.

THEREFORE, the Grand Jury, through myself, after a vote duly taken, joins in the application of the Deputy Attorney General for an Order extending the September 1978 Term of the Court, and the Term of the September GRAND JURY NUMBER III to and including January 2, 1979.

s/Roger Kendall
ROGER KENDALL, Foreman
SEPTEMBER GRAND JURY
NUMBER III

Sworn to
September 29th, 1978

APPENDIX O—ORDER DATED OCTOBER 27, 1978

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 27, 1978.

HON. MILTON MOLLEN, Presiding Justice
HON. HENRY J. LATHAM
HON. VINCENT D. DAMIANI
HON. VITO J. TITONI, Associate Justices

In the Matter of Ben Cammarata & Son, etc.,

Appellant,

for an order Quashing a Subpoena Duces Tecum issued by Deputy Attorney General Charles J. Hynes,

Respondent,

In the Matter of Direct Plumbing & Heating Corp. et al.,

Appellants,

for an order Quashing Subpoenas Duces Tecum issued by Deputy Attorney General Charles J. Hynes,

Respondent.

In the above entitled causes, the above named Ben Cammarata & Son, etc. and Direct Plumbing & Heating Corp., et al., petitioners, having appealed to this court

from an order of the County Court, Suffolk County, entered October 6 1978; and the appellants having moved to stay the enforcement of said order, pending determination of the appeal therefrom;

Now, upon the papers filed in support of and in opposition to the motion, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby denied. Temporary stay contained in order to show cause dated October 19, 1978 vacated. The papers submitted by the Deputy Attorney in opposition to this motion are ordered sealed and the clerk of this court is directed to seal said papers.

Enter:
IRVING N. SELKIN
Clerk of Appellate Division

APPENDIX P—ORDER EXTENDING THE TERM OF THE 1979 OCTOBER GRAND JURY NUMBER 1C

At a Term, Part IV of the County Court of Suffolk County, held at the Criminal Courts Building, Center Drive South, Riverhead, New York on the 26th day of October, 1979.

PRESENT:
HON. JOHN COPERTINO
County Court Judge

In the Matter of the Application of

CHARLES J. HYNES, Special Deputy Attorney General, for an Order Extending the October 1979 Term of the County Court and the Term of the October GRAND JURY NUMBER IC to February 1, 1980.

It appearing from the attached affidavits and applications of Terrence P. Buckley, Special Assistant Attorney General of the State of New York, and George M. Nash, Foreman of the October 1979 Grand Jury Number IC, that the Grand Jury is currently investigating criminal activities in Suffolk County involving a hospital and a nursing home; that it is necessary that additional testimony be heard by said Grand Jury for the proper and complete presentation and consideration of the aforesaid matters now pending before it; that the Grand Jury has not completed, nor will be able to complete its business currently pending as described above before the expiration of its Term on October 26, 1979; that the necessary additional testimony cannot be completed by October 26, 1979, and that the application made herein was authorized by the af-

firmative vote of a majority of the above-captioned Grand Jury; therefore it is

ORDERED, that the October 1979 Term of the County Court of Suffolk County and the Term of the October 1979 GRAND JURY NUMBER IC be and the same is hereby extended to and including February 1, 1980.

ENTER
s/ John Copertino
COUNTY COURT JUDGE
COUNTY OF SUFFOLK

Granted
October 26, 1979

APPENDIX Q—AFFIDAVIT OF TERRENCE P. BUCKLEY AND APPLICATION

COUNTY COURT
COUNTY OF SUFFOLK

In the Matter of the Application of

CHARLES J. HYNES, Special Deputy Attorney General, for an Order Extending the October 1979 Term of the County Court and the Term of the October GRAND JURY NUMBER IC to February 1, 1980.

STATE OF NEW YORK)
SS.:
COUNTY OF SUFFOLK)

Terrence P. Buckley, being duly sworn, deposes and says:

I am a Special Assistant Attorney General of the State of New York, in the Long Island Office of Charles J. Hynes, Deputy Attorney General, appointed by Attorney General Louis Lefkowitz on January 10, 1975. That appointment was made in connection with the requests of the Honorable Abe Levine, Commissioner of the New York State Department of Social Services, and the Honorable Hollis Ingraham, Commissioner of the New York State Department of Health, made pursuant to the provisions of Section 63, subdivision 3 of the Executive Law. In October of 1977, Deputy Attorney General Hynes' authority was supplemented to include investigation, and if need be, prosecution of hospitals in New York State.

The Office of the Deputy Attorney General is required to investigate the alleged commission of any indictable offense or offenses in violation of the Public Health Law or the Social Service Law, or in relation to any mat-

ters connected with the New York State Department of Health or the New York State Department of Social Services, by hospitals, adult homes, nursing homes, health related facilities, care centers and related entities, and entities subject to the provisions of Article 28 of the Public Health Law, located in the State of New York, and principals, agents, suppliers, and other persons connected or involved therewith; and it is furthermore the duty of the Office of the Deputy Attorney General to prosecute the person or persons believed to have committed the same or any crimes or offenses arising out of the described investigations or prosecutions or both.

In connection with the described investigative and prosecutorial responsibilities, the Office of the Deputy Attorney General has presented, and is currently presenting, evidence concerning the above-described investigations to the October 1979 Suffolk County GRAND JURY NUMBER IC. This Grand Jury was empanelled on October 1, 1979 by the Honorable John Copertino County Court Judge.

At the present time, there is pending before the Grand Jury investigations concerning one hospital and one nursing home.

Each of the ivnestigations referred to above involves a complicated financial fraud. In order to properly investigate such a case it is necessary to scrutinize the books and records of the institution as well as various businesses dealing with the institution.

The Office of the Deputy Attorney General plans to call several dozen additional witnesses before the Grand Jury will be in a position to conclude these investigations. A substantial portion of those witnesses must testify about complicated record keeping and accounting practices. It is clear to me that this Grand Jury will require an extension of their term for at least three months to properly conclude each investigation.

Based upon all of the above, it is my declaration that the October GRAND JURY NUMBER IC for the County of Suffolk has not completed, nor will be able to complete its stated business before the expiration of its present term on October 26, 1979.

WHEREFORE, it is requested that this Honorable Court extend the term of the County Court of the County of Suffolk, and the term of the October 1979 GRAND JURY NUMBER IC to and including February 1, 1980.

Dated: Hauppauge, New York
October 24, 1979

s/Terrence P. Buckley
TERRENCE P. BUCKLEY
Special Assistant Attorney General

Sworn to
October 24, 1979

APPENDIX R—PETITION AND AFFIDAVIT

COUNTY COURT
COUNTY OF SUFFOLK

In the Matter of the Application of

CHARLES J. HYNES, Special Deputy Attorney General, for an Order Extending the October 1979 Term of the County Court and the Term of the October GRAND JURY NUMBER IC to February 1, 1980.

TO THE COUNTY COURT OF SUFFOLK COUNTY:

The petition of George M. Nash, respectfully shows to the Court as follows:

I am the Foreman of the October 1979 GRAND JURY NUMBER IC and make this application pursuant to the affirmative vote of the Grand Jury.

I have read the attached affidavit and application of Terrence P. Buckley, and reaffirm those statements made with respect to the investigations being conducted by the Grand Jury.

It is the declaration of the October 1979 GRAND JURY NUMBER IC, through myself as its Foreman, after a vote duly taken, that the Grand Jury has not yet completed the matters before it by October 26, 1979, the date on which the October 1979 Term of the Court and the term of the above-captioned Grand Jury expires.

THEREFORE, the Grand Jury, through myself, after a vote duly taken, joins in the application of the Deputy Attorney General for an Order extending the October 1979 Term of the Court, and the Term of the October 1979 GRAND JURY NUMBER IC to and including February 1, 1980.

s/George M. Nash
GEORGE M. NASH, Foreman
October 1979 Grand Jury Number IC

Sworn to
October 26, 1979

APPENDIX S—JUDGMENT DATED FEB. 19, 1980

At a Special Term Part I of the Supreme Court of the State of New York held in and for the County of Suffolk at the Courthouse at Riverhead, New York, on the 19th day of February, 1980.

PRESENT:
HON. JOHN G. McCARTHY
Justice

In the Matter of the Application of
BARBARA McGINLEY,

Petitioner,

for an Order pursuant to Article 78,
Civil Practice Law and Rules,

-against-

HON. CHARLES J. HYNES,
Deputy Attorney General and CHEMICAL BANK,

Respondents.

Petitioner having brought on a Special Proceeding pursuant to Article 78 of the Civil Practice Law & Rules to stay Respondent HYNES from pursuing the investigation of BRUNSWICK HOSPITAL CENTER, INC., its agents and employees, before the October, 1979 Grand Jury III, and to prohibit production by CHEMICAL BANK of any and all bank records designated in the subpoena duces tecum dated October 30, 1979 before the said October, 1979 Grand Jury, and upon reading and filing the Order to

Show Cause, dated November 30, 1979, and signed by Hon. Lawrence J. Bracken, a Justice of the Supreme Court of the State of New York for the County of Suffolk, the Petition of BARBARA McGINLEY, verified on the 30th day of November, 1979, the Affidavit of BARBARA McGINLEY, sworn to on the 30th day of November, 1979, and the exhibits annexed with proof of service thereof, and the Reply Affirmation of STEPHEN R. TAUB, affirmed the 17th day of December, 1979, with proof of service thereof, all in support of the Special Proceeding, and the Affirmation of TERRENCE P. BUCKLEY, Special Assistant Attorney General, dated December 6, 1979, with proof of service thereof, in opposition to said Special Proceeding, and said Special Proceeding having come on to be heard at a Special Term, before Hon. John G. McCarthy, Part I, on the 10th day of December, 1979, and STEPHEN R. TAUB, ESQ. having appeared in support of said Special Proceeding, and TERRENCE P. BUCKLEY, ESQ., having submitted in opposition thereto, and due deliberation having been had thereon and the Court having made its decision in writing,

NOW, on motion of STEPHEN R. TAUB, ESQ., attorney for Petitioner, it is hereby

ORDERED, DECREED AND ADJUDGED, that the Petition herein be and the same is hereby dismissed.

ENTER:
JOHN G. McCARTHY
J.S.C.

Filed
February 25, 1980

Granted
February 19, 1980

No. 80-996

Supreme Court, U. S.
FILED
JAN 8 1981
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

BARBARA McGINLEY,

Petitioner,

against

CHARLES J. HYNES, Deputy Attorney General of the State of New York,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EDWARD J. KURIANSKY
Deputy Attorney General
State of New York
270 Broadway
New York, New York 10007
(212) 488-5283

ARTHUR G. WEINSTEIN
Special Assistant Attorney General
Of Counsel

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No. 80-996

IN THE

Supreme Court of the United States

October Term, 1980

BARBARA MCGINLEY,

Petitioner,

against

CHARLES J. HYNES, Deputy Attorney General of the State of New York,*

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

Respondent Hynes was, at the time this action arose, a Deputy Attorney General of the State of New York, authorized by the Governor and the Attorney General to investigate the alleged commission of various indictable offenses by the State's hospitals, their principals, agents and suppliers (23a-25a).** Pursuant to this authority, respondent

* The petition is so entitled. Respondent was succeeded by Edward J. Kuriansky on December 8, 1980, prior to filing.

** Page references are to the appendices to the petition for certiorari.

initiated an investigation before a September 1978 Grand Jury into possible kickback and rebate schemes involving Medicaid fraud at the Brunswick Hospital Center, a general hospital located in Suffolk County, New York (3a). The inquiry was precipitated by what the New York State Court of Appeals called "some rather unusual business transactions between Brunswick and two of its regular suppliers" (*id.*).

The term of that Grand Jury expired nine months later, on June 22, 1979, when its members rejected the prosecutor's request that the Grand Jury seek a further extension from the empanelling court in order to complete the investigation (5a). This refusal, the Court of Appeals concluded, was based "not upon [the Grand Jury's] belief that no crime had been committed, but, rather, upon the Grand Jurors' impatience with the repeated delays occasioned by the witnesses' recalcitrance" (id). The court noted that the investigation had been "plagued with delays" from its inception, being repeatedly obstructed by witnesses who refused to appear or to produce documentary evidence when subpoenaed; and that this pattern of "dilatory tactics" by the hospital, its suppliers and their lawyers not only prevented the Grand Jury from taking any action in the matter, but even confounded the efforts of the trial judge to conduct contempt proceedings against the recalitrant witnesses (3a-5a).

A new Grand Jury was convened in October of 1979 in an effort to acquire and evaluate the evidence which the initial panel did not reach (5a). Shortly thereafter, petitioner Barbara McGinley, an employee of the hospital, brought a civil proceeding in the Supreme Court, Suffolk County, a state court of original jurisdiction, to prohibit

the continuation of the investigation by the successor Grand Jury on the theory that the failure of the prior panel to return any indictment was equivalent to a dismissal of all potential charges against the hospital and its employees and suppliers; arguing that resubmission of these charges to the successor Grand Jury without a court order violated section 190.75, subd. 3, of the New York Criminal Procedure Law (6a). That statute requires judicial authorization for the resubmission of "dismissed" charges to the same or a successor Grand Jury. Under the statute, a dismissal is a finding by the Grand Jury that, upon a charge that a designated person committed an offense, either (a) the evidence was not legally sufficient, or (b) that it did not establish reasonable cause; such a finding must be filed by the foreman with the empanelling court (CPL § 190.75, subd. 1). Petitioner, however, urged that the first Grand Jury's nonaction was the functional equivalent of a dismissal and sought to enjoin all the proceedings before its successor (6a). The petition was brought pursuant to Article 78 of the New York Civil Practice Law and Rules, which codifies the common law writs of prohibition and mandamus (CPLR § 7801).

The petition was dismissed by the Suffolk County Supreme Court on the ground that Article 78 was an extraordinary procedure which did not lie to enjoin the Grand Jury's investigation (20a). The Appellate Division, Second Department, reversed and granted the writ, without discussing the procedural question, on the ground that the investigation had been substantially concluded before the original Grand Jury and that a court order authorizing resubmission was therefore required, citing section 190.75 (15a-18a). The New York Court of Appeals, however, re-

versed the Appellate Division, without reaching the merits of petitioner's contention, solely "because we conclude that prohibition does not lie under circumstances such as these" (7a). The Court of Appeals held that so long as the prosecutor and the Grand Jury were performing a "purely investigative function," they were not subject to prohibition under Article 78; the Court interpreted Article 78 as being available only to challenge "quasi-judicial," as opposed to "executive," acts and determinations (7a-11a). It held that petitioner's remedy, if any, lay through other available procedures (11a).

Petitioner then moved for reargument before the Court of Appeals, seeking to raise, for the first time, two federal constitutional issues. She contended, first, that "procedural due process" guaranteed a right to seek prohibition against a Grand Jury allegedly operating improperly or illegally; and, second, that due process required judicial authorization for resubmission of charges "in all cases"—thereby arguing, in effect, that section 190.75, upon which she had originally relied, was unconstitutional in requiring judicial permission only where a dismissal had been filed. In the alternative, petitioner requested an amendment of the remittitur to recite that the procedural due process had been considered by the Court and for a stay pending certiorari proceedings. The Court of Appeals denied reargument and refused to amend the remittitur or to grant the stay (1a).

Reasons for Denying the Writ

A. No constitutional issue was passed upon by the New York courts.

Despite the clear mandate of Rule 21.1(h), petitioner has not even attempted to show that the federal issue she now seeks to argue was "timely and properly" raised in the State courts. This is not surprising. As the opinions by all three New York Courts clearly show, no federal constitutional issue was ever considered by any of them. Indeed, the federal constitution was not even invoked until after petitioner lost in the Court of Appeals and that Court, evidently adhering to its long-standing policy of not permitting constitutional issues to be raised for the first time at that level, *DiBella* v. *DiBella,* 47 N.Y.2d 828, 39 N.E.2d 564, 418 N.Y.S.2d 577 (1979), refused to entertain reargument to consider the claim. Equally significantly, it simultaneously denied petitioner's motion to amend the remittitur to recite that a constitutional issue had been passed upon. It would be manifestly improper to permit such an issue to be raised for the first time in this Court. *Ellis* v. *Dixon,* 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231, *reh. denied,* 350 U.S. 855, 76 S.Ct. 37, 100 L.Ed. 759 (1955).

B. This is an inappropriate case in which to reconsider *United States* v. *Thompson.*

Petitioner seeks certiorari to have the Court reconsider, and presumably reverse, its decision in *United States* v. *Thompson,* 251 U.S. 407, 40 S.Ct. 289, 64 L.Ed. 333 (1920), holding that representation of a case to a successor grand jury does not require judicial permission. The Court held that the powers of the district attorney and Grand Jury

were unfettered in this regard, agreeing with the Government's analysis "of the common law, of the stautory law of the United States, of the practices from the beginning, and of the adjudications of this court which settle the question." *Id.* at 413, 40 S.Ct. at 292, 64 L.Ed. at 342.* As petitioner concedes, "This ruling has been followed, without question," for sixty years (petition at 9). *E.g., United States* v. *Barone,* 584 F.2d 118, 123 (6th Cir. 1978), *cert. denied,* 439 U.S. 1115, 99 S.Ct. 1019, 59 L.Ed.2d 73 (1979); *United States* v. *Kysar,* 459 F.2d 422, 423 (10th Cir. 1972). But even if *Thompson* were ripe for reconsideration, this clearly would not be an appropriate case in which to reconsider it.

In the first place, the Court cannot logically reach the issue unless it first holds that the New York Court of Appeals acted unconstitutionally in requiring petitioner's challenge to be raised in an action other than an Article 78 proceeding. *Cf. Ellis* v. *Dixon, supra.* This Court has never implied that there is any constitutional infirmity in the long-recognized principle that an extraordinary writ does not lie when there is a conventional remedy at law. *See, e.g., Helstoki* v. *Meanor,* 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979). The claim that "procedural due process" requires that a writ of prohibition be available to petitioner is not even pressed in the current petition. And even if the Court were to so hold, the proper remedy would be to then remand so that the New York Court of Appeals could consider, for the first time, the merits of the petition —

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* Thompson's arguments had been based upon an exception under Pennsylvania law, and thus the Court did not explicitly address the constitutionality of the prevailing rule. *Thompson* has since been viewed, however, as tacitly sustaining the constitutionality of federal practice. *Cf. United States* v. *Atlantic Commission Co.,* 45 F.Supp. 187, 191 (E.D.N.C. 1942).

which it could well resolve on non-constitutional grounds such as standing (*see* 12a) or the statutory interpretation adopted by the Appellate Division.

In the second place, this is, as the Court of Appeals noted, not a case in which the prosecutor has attempted to resubmit "specific charges against a particular, named defendant to a second Grand Jury after a prior Grand Jury has voted to dismiss or has been discharged without taking any action on the charge" (12a). Any reassessment of *Thompson* on the theory that it permits predatory "forum shopping" or "harassment" (petition at 10) would logically begin under those facts. Here, by contrast, there is a clear finding that the investigation was frustrated, before charges could be formulated or the evidence fully explored, by the improper, and frequently illegal, dilatory tactics deliberately engaged in by the targets. The viability of *Thompson* in this situation can scarcely be questioned.

C. The case is likely to become moot.

After the Court of Appeals vacated the writ of prohibition in October of 1980, the current Grand Jury promptly resumed its investigation. On December 22, Associate Justice Marshall, as Circuit Justice, denied a stay notwithstanding petitioner's plea that without one "the petition will be academic and become moot" (letter to Justice Marshall, Dec. 16, 1980). Although it is too soon to predict exactly when the Grand Jury's investigation will be concluded, respondent agrees that it is at least very likely to terminate before this case can be briefed, argued, and decided. *DeFunis* v. *Odegaard,* 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

Conclusion

Certiorari should be denied.

Respectfully submitted,

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